BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

V. J. MAGEE, Claimant, v. THOMPSON CREEK MINING COMPANY, Employer, and ACE FIRE UNDERWRITERS INSURANCE COMPANY, Surety, Defendants.	)	**IC 00-020426** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed October 15, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls, Idaho, on March 17, 2004. Claimant was present and represented by Emil F. Pike, Jr., of Twin Falls. Glenna M. Christensen of Boise represented Employer/Surety. Oral and documentary evidence was presented. The parties took three post-hearing depositions and submitted post-hearing briefs. This matter came under advisement on August 6, 2004, and is now ready for decision.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant suffered an injury as the result of an accident arising out of and in the course of his employment;

2. Whether Claimant's condition is due in whole or in part to a pre-existing condition not work related;

3. Whether and to what extent Claimant is entitled to continuing medical care;

4. Whether and to what extent Claimant is entitled to:

(a) Temporary total disability (TTD) benefits;

(b) Permanent partial impairment (PPI) benefits; and,

(c) Permanent partial disability (PPD) benefits including whether Claimant is totally and permanently disabled pursuant to the "odd-lot" doctrine;

5. Whether any PPD less than total should be apportioned pursuant to Idaho Code § 72-406;

6. Whether Claimant is medically stable and, if so, the date he reached such stability;

7. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804;

8. Whether Claimant is entitled to payment of or reimbursement for certain medical expenses; and,

9. Whether Claimant is entitled to mileage reimbursement for medical appointments.

The issues of TTD benefits, medical stability, and attorney fees were not addressed in the parties' post-hearing briefs and are deemed waived.

CONTENTIONS OF THE PARTIES

Claimant contends he is totally and permanently disabled as the result of a back injury he suffered in a near slip and fall at Employer's mine. He also wants his medical and prescription bills paid and reimbursement for mileage to his medical appointments.

Although Defendants initially accepted Claimant's claim, they now argue that Claimant was not injured in any fall at work and he is not totally and permanently disabled thereby. They also question the reasonableness of the treatment regimen of Claimant's treating physician and contend they should not have to pay for it.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his estranged wife, and Employer's Human Resource Safety Manager presented at the hearing.

2. Claimant's Exhibits A-E admitted at the hearing.

3. Defendants' Exhibits A-J admitted at the hearing.

4. The post-hearing deposition of Curt G. Kurtz, M.D., with one exhibit taken by Claimant on April 13, 2004, and the depositions of Henry H. Gary, M.D., with one exhibit, and that of Michael A. Sousa, M.D., both taken by Defendants on April 14, 2004.

Defendants' objections made during the taking of Dr. Kurtz deposition are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 53 years of age at the time of the hearing and resided in Raidersburg, a small mining town in Montana. He has an 8th grade education and no GED. He has worked primarily as an underground miner and millwright, but has also worked in the oil fields and has driven trucks. He has generally worked as a heavy laborer.

2. Claimant injured his back, SI joint, and left ulnar nerve in 1983; it took him about three years to recover. Since that time he was able to return to heavy work.

3. Claimant alleges that on May 6, 2000, he either mis-stepped or slipped while going up some stairs at Employer's mine near Challis and fell on his leg on the landing. He thought he pulled a muscle in his right hip. He finished his shift as he "didn't think nothing about it." Hearing Transcript, p. 20.

4. Claimant's shift ended at 7:00 a.m. and he went to his temporary home in Clayton and went to bed. By 10:00 a.m. he was experiencing pain down his right leg. He had a neighbor summon an ambulance that was kept at Employer's mine and he was transported to the hospital at Sun Valley. He gave a history consistent with his hearing testimony regarding his near slip and fall. He was complaining of severe low back pain with radiation into his right leg, but not beyond his knee. The treating physician diagnosed acute low back pain with sciatica. An X-ray did not reveal any acute pathology of the lumbar spine. An MRI was ordered to rule out an acute herniation or free fragment versus a simple strain. Of note, Claimant was kept overnight as he was unable to be treated adequately for pain with IM Demerol 100, 4 mg total of morphine, and 2 oral Vicodin.

5. Claimant's wife (Cathy) drove from Montana to pick Claimant up the following day. His wife testified that he was in "agony" of a type she had not seen before when she picked him up. Claimant

testified, "[m]y wife took me home and dumped me on the floor at the house and said, 'I've got to go to work,' and that – I stayed there for a month on the floor in the house." Hearing Transcript, p. 23. Cathy corroborated Claimant's testimony in that regard but testified she thought he laid on the floor from two weeks to a month before he first sought medical treatment.

6. Claimant eventually contacted his family physician, Curt G. Kurtz, M.D., who had him come to his (Dr. Kurtz) house for treatment. Dr. Kurtz testified that Claimant stayed at his home for several days until he was stable enough to return to his own home. Dr. Kurtz had no memory of making a note of that visit but his records admitted into evidence show that he saw Claimant for the first time regarding the subject accident on May 11, 2000. Consequently, both Claimant and his wife are in error regarding the amount of time Claimant spent laying on the floor (five days versus two weeks to a month).

7. Claimant embarked upon a lengthy course of treatment with Dr. Kurtz, a board-certified family practitioner who has practiced in Montana since 1968. That treatment spanned slightly over three years[1] and involved approximately 88 weekly or biweekly visits according to his medical records that consume 103 pages of the record. Dr. Kurtz treated Claimant primarily for an acute low back strain, a stretched sciatic nerve, and an SI joint "disruption." His treatment regimen included Colchicine IV, trigger point injections, and Prolo therapy. Dr. Kurtz described Colchicine as a "real old anti-inflammatory" that reduces swelling in nerves and other tissue. It is FDA approved for the treatment of acute gout only. Dr. Kurtz described Prolo therapy as:

> Prolo therapy is an old treatment from Germany that dates back about 150 years where they felt that if you injected an irritant into a tendon or a joint or a ligament or a muscle that the irritation would cause the memory of the cells that created the muscle to come forward, the memory would open up, you take a look around, clean out the junk and actually build a new ligament, tendon, muscle, joint lining, et. cetera.

Dr. Kurtz Deposition, pp. 13-14.

DISCUSSION AND FURTHER FINDINGS

The accident/injury:

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and

[1] The last medical record in evidence from Dr. Kurtz is dated June 12, 2003. However, in his deposition on April 13, 2004, Dr. Kurtz testified that he had been seeing Claimant about every two weeks.

place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as having "more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

8. Defendants presented the testimony of Cathy in an attempt to show that Claimant did not have an accident and injury as he alleges. She testified that Claimant had hurt his back while lifting a table about two-and-a-half to three weeks before he went to work for Employer. She testified that Claimant told her he would have to get a job to be able to see a doctor as they had no health insurance. She also questioned the severity of any injury he might have sustained at Employer's as he alleges, citing various activities he performed after quitting and moving back to Montana. Claimant acknowledged the "table-lifting incident" but claimed it was a light table, he did not hurt his back, and he worked for 18 months for Employer without problems after that. Further, the activities she described him doing after his alleged accident were not strenuous and were generally engaged in after he had had a trigger point or Colchicine injection and was not in a lot of pain.

9. The Referee finds the testimony of Cathy unpersuasive. She was in the process of divorcing Claimant at the time of the hearing and testified Claimant had placed a restraining order on her. Further, she admitted that she did not personally witness the table-lifting incident and that Claimant told her that he missed a step at Employer's because he "had to tell them something." Hearing Transcript, p. 91. Cathy also testified that she did not know whether Claimant injured his back at work. As the following demonstrates, Cathy was far from an unbiased witness:

Q. (By Ms. Christensen): And why are you willing to testify now about it?

A. Well, circumstances that have happened, he hasn't been nice to me, so I figure I will tell the truth, and not – not let him get by with it.

. . .

Q. (By Mr. Pike): Are you testifying today just to get even with Mr. Magee?

A. No. There's part of it, yes, part of it, no.

Hearing Transcript, pp. 98-99, 113.

10. Defendants also presented the testimony of Linda Wanstrath (Wanstrath), the Human Resources Safety Manager for Employer. She testified that Claimant did not tell her he was hurt on the job when she first talked to him after his injury so she suggested that he apply for short-term disability (STD), which he did. Because Claimant had initially filled out a form that indicated his accident was work-related, Wanstrath called him and told him he would have to change the form to show his injury was not work-related in order to collect STD. Claimant did so but testified he did not understand what was being asked of him. He did collect some STD but returned the money when he understood that in order to qualify he must state that he was not hurt on the job. Claimant was unwilling to do so as he knew he was hurt on the job.

11. Wanstrath also testified that she did not believe Claimant was hurt on the job because he did not timely report it and continued his shift and she so informed Surety. She does not know why Surety accepted the claim.

12. Like Cathy's testimony, Wanstrath's testimony sheds no light on whether Claimant suffered an accident and injury at Employer's on May 6, 2000. Claimant's testimony was not successfully impeached. Of significance is the fact that if Claimant intended on fraudulently staging an accident and committing perjury in testifying about it, then one would think that he would have done something in the presence of a witness or witnesses such as feigning pain while lifting. Here, his accident was not particularly "dramatic" mechanically and was unwitnessed. That simply does not make sense and tends to bolster Claimant's credibility rather than diminish it.

13. The Referee finds that Claimant suffered an accident causing an injury arising out of and in the course of his employment on May 6, 2000.

PPI and apportionment:

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

14. Dr. Kurtz assigned Claimant a whole person PPI rating of 28% according to DRE category V of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (*Guides)*. He assigned an additional 10% whole person PPI according to Table 15-19 for a fracture of the sacrum into the SI joint for a total of 38%.[2] At Defendants' request, Henry H. Gary, M.D., a board certified neurosurgeon, and Michael A. Sousa, M.D., a board certified orthopedic surgeon and IME examiner, both practicing in Montana (the panel), saw Claimant on May 1, 2001, and again on March 3, 2004. Utilizing the Fourth Edition of the *Guides*, page 3/102, DRE Lumbosacral, Category 3, the panel assigned Claimant a 10% whole person PPI. Dr. Sousa commented in his deposition on the methodology used by Dr. Kurtz in arriving at his PPI rating:

> Q. (By Ms. Christensen): No. He [Dr. Kurtz] was looking at the Fourth Edition – excuse me—the Fifth Edition, page 387. He looked under DRE, Category 4 is where he placed him?
>
> A. Well, first of all, there's two things: One is there is no evidence that Mr. Magee had a sacroiliac fracture, at least from the record that we evaluated. There was no X-ray evidence or CT evidence that he had sustained a fracture of the sacroiliac.
>
> Secondly, the DRE Category 4 impairment is for a loss of integrity of a segmental region in the spine secondary to either fusion or injury in which there's a translation of the vertebrae, one upon the other, and neither of which he had had.
>
> So I – and actually the Category 5, 28 percent, I'm sorry, would be – and I'll read: The impairment would be one [that] meets criteria for Categories 3 and 4; that is, both radiculopathy, i.e. nerve injury, if you will, from a disc herniation, and alterations of motion

[2] The Referee takes notice that according to the combined values chart in the *Guides*, 5th Edition, 28% plus 10% equals 35%, not 38%.

> segment integrity in which they're either fused if there's significant slippage of one vertebrae on another. And, also, there has to be significant lower extremity impairment, as seen with – indicated by atrophy or loss of reflexes and sensory changes in anatomic distribution.
>
> So the clincher is that, one, it's a different impairment book. Secondly, the patient does not have evidence – and the evidence that we were presented with – of altered motion segment integrity. And so he would not fit in Category 5, unless he did have or consented to have a fusion, and reexploration of the L5-S1 disc spaces had been recommended.

Dr. Sousa Deposition, pp. 18-19.

15. The panel opined that their 10% whole person PPI rating would also apply to any PPI that would have been assigned for Claimant's 1983 injury and discectomy. However, because the panel had no medical records regarding the 1983 injury and were not aware of any PPI rating being assigned for that injury, they assigned their rating based on the 2000 injury.

16. The Referee is more persuaded by the opinions of the panel than those of Dr. Kurtz regarding PPI. It has been this Referee's experience that a rating in the neighborhood of 10% is common for the type of injuries sustained by Claimant. Because Claimant recovered from his 1983 back injury and returned to heavy labor for a number of years with no apparent difficulty, the Referee finds that apportionment is not warranted in this case. The Referee finds that Claimant has incurred a 10% whole person PPI solely as the result of his May 6, 2000, injury.

Continuing medical care:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See,* Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

17. Dr. Kurtz testified that he recommends Claimant continue with the Colchicine injections to keep his injured L5-S1 nerve root unswollen to allow Claimant to be more active. He testified that the Prolo therapy stabilized Claimant's SI joint but he would continue those injections if Claimant continued to experience pain in that area. Claimant estimates that because his last back injury in 1983 took three to four years to resolve, this injury should take about the same amount of time.

18. In their report of May 1, 2001, the panel recommended two treatment options. One would be to continue with Dr. Kurtz conservative care including a stretching program and nonsteroidal

anti-inflammatories. The other would be a lumbosacral fusion. In the panel's report of March 3, 2004, they indicate that Claimant told them he does not wish for surgery or any more injections, but may change his mind if his condition deteriorates. They also note that Claimant informed them that Dr. Kurtz Colchicine injections had been beneficial. Because Claimant did not want surgery or other invasive treatment, the panel did not recommend further diagnostic testing. However, should Claimant's symptoms worsen, they recommend a repeat MRI scan with contrast. They do recommend continuing conservative care. In his April 14, 2004, deposition, Dr. Gary testified that Claimant should not continue with the Colchicine IV treatment. The Referee finds that Claimant has failed to prove his need for further medical treatment as the result of his May 6, 2000, injury. Dr. Kurtz testified that it should take three to four years for Claimant to heal. As for Dr. Kurtz deposition on April 13, 2004, it had been close to four years since Claimant's injury. In the event Claimant's condition worsens and he changes his mind regarding surgery or other invasive treatment options, he has available to him Idaho Code § 72-432(1) or may petition for a change of condition pursuant to Idaho Code § 72-719(1)(a).

PPD benefits:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant,

provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, and Claimant herein has not, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. Boley v. State Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State of Idaho, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing* Arnold v. Splendid Bakery, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a super human effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing* Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Odd-lot status may be proved in one of three ways:

(1) by showing what other types of employment the employee has attempted;

(2) by showing the employee, or vocational counselors, employment agencies, or the Job Service on behalf of the employee, have searched for other work for the employee, and that other work was not available; or,

(3) by showing that any efforts by the employee to find suitable employment would have been futile. Huerta v. School District No. 431, 116 Idaho 43, 47, 773 P.2d 1130, 1134 (1989). The burden of establishing odd-lot status lies with the claimant. Rost v. J.R. Simplot, 106 Idaho 444, 680 P.2d 866 (1984).

19. As previously indicated, Claimant's work history has been that of doing heavy work. The panel has opined Claimant now fits within the sedentary to light work categories with ad lib position changes and no prolonged sitting, standing, stooping, or bending.

20. Dr. Kurtz does not believe Claimant can work at all because:

> Q. (By Mr. Pike): Now, Doctor, in a report dated November 27th, 2001, you stated that Mr. Magee could possibly return to work in his field. Restrictions would be on the weight he could lift and that he could carry, and so in [*sic*] November 27th, 2001, you indicated he could possibly return to work with some restrictions on the weight.
>
> Today are you changing that opinion or do you still have that opinion today?
>
> A. No. In November of 2001 I was trying to work with the – the company that he worked for to get him back to work. And we tried to get – with the restrictions placed, but he got down there and there was nothing that he could do with those restrictions at all.
>
> And at this point in time, after watching him and getting everything back and stable and everything else and seeing that he still has chronic pain, he still is being adversely affected by the weather, he's still being adversely affected by electrical storms, and it's so unpredictable as to whether he can drive or not because of the swelling in his lower back, I would say that he could not go back to work.

Dr. Kurtz Deposition, pp. 29-30.

In spite of the foregoing, Dr. Kurtz checked a box "yes" in a letter dated June 4, 2002, from Surety's case management service indicating he agreed with the panel's opinion that Claimant could perform sedentary to light work. Claimant's Exhibit B.

21. After his accident, a caseworker for Surety informed Claimant that he must return to a light duty position doing inventory and cleaning parts or he would lose his benefits. Claimant testified that he worked for four or five days but could not continue due to his having to take pain medication and was afraid he would get in an accident while driving the mountain road between the mine and his trailer in Clayton. Wanstrath confirmed that it was a caseworker who determined that Claimant could return to light duty work. However, Wanstrath testified that Claimant only worked one day before he obtained a release from Dr. Kurtz taking him completely off work. She also testified that she observed Claimant working and that he did not appear to be having any difficulty. The light duty job provided to Claimant was not intended to become a permanent position.

22. The only other employment Claimant attempted was flagging on highway jobs in 2001. He testified that he made about $4,000 dollars but because he was taking up to 100 pain pills on a four-day job he was afraid of injuring himself so he quit.

23. There is scant evidence regarding Claimant's employability in his labor market. No vocational consultants were involved in this case. The Referee is not acquainted with the labor market surrounding Claimant's current residence in Raidersville, Montana, and there is nothing in the record regarding the same. Claimant testified he could work in Bozeman or Helena but knows of no work that he could do. He is presently receiving Social Security disability benefits. He has not registered for the job service and has not requested vocational assistance in any job search. Dr. Kurtz opinion that Claimant is unemployable is not persuasive. Claimant's work attempts are also not persuasive as he voluntarily quit his flagging job based on his own opinions regarding safety issues; no physician opined he could not perform that type of work. He has not attempted to locate work since his flagging job in 2001. On the present record, the Referee is not convinced that any further effort by Claimant to locate employment would be futile as there is no evidence of the availability of sedentary or light jobs in his labor market. The Referee finds that Claimant has failed to establish a *prima facie* case of odd-lot status. *See,* Seufert v. Larson, 137 Idaho 589, 51 P.3d 403 (2002).

24. Even though Claimant has failed to establish odd-lot status, that finding does not end the enquiry regarding whether he has incurred some PPD less than total. Claimant has lost access to medium and heavy labor jobs that he had access to prior to his accident and injury in 2000. He cannot return to his time of injury job as a millwright. He earned a decent living as a miner and millwright ($14-$20 an hour) and will no doubt suffer a wage loss if he re-enters the labor market. No vocational expert has quantified the loss of access or wages. However, based on the Referee's experience in other cases, Claimant's prior work history, his demeanor and physical appearance at hearing, his seeming lack of motivation to return to any type of work, his education, his transferable skills in operating equipment and problem-solving, his age, and his economic and personal circumstances, the Referee finds that Claimant has incurred PPD of 20% of the whole person inclusive of his 10% PPI. The Referee further finds that apportionment pursuant

to Idaho Code § 72-406 is not appropriate in this case as Claimant had returned to doing heavy work for a number of years after his 1983 back injury.

Payment of or reimbursement for medical treatment:

25. According to Defendants' Answer filed January 7, 2003, they have paid $39,401.28 in medical benefits on this claim. Claimant asserts he is entitled to $7,645.00 in unpaid bills from Dr. Kurtz. *See,* Claimant's Exhibit C and Exhibit A to Dr. Kurtz deposition. Defendants contend Dr. Kurtz Colchicine IV treatments are not only unreasonable, but potentially harmful. Nonetheless, Defendants paid for at least a portion of Dr. Kurtz Colchicine treatments as is evidenced by a letter from Dr. Kurtz to Claimant's attorney dated December 18, 2001, wherein he indicated that Surety would no longer pay for "off label" Colchicine injections. It cannot be determined from the record whether Surety provided notice to Claimant of their intention to stop paying Dr. Kurtz pursuant to Idaho Code § 72-806.

26. Dr. Kurtz provided Colchicine IV treatments in his treatment of what he believed to be a stretched sciatic nerve, SI joint instability, and an injured nerve root at L5-S1. Claimant's diagnoses have not been clear-cut. On February 20, 2001, Dr. Kurtz referred Claimant to Michael A. Dube, M.D., an orthopedic surgeon, for a possible SI joint fusion. Dr. Dube saw Claimant on March 27, 2001, and after examination, disagreed with Dr. Kurtz that Claimant had an SI joint instability. After ordering a CT scan, Dr. Dube believed Claimant's problem was from an L5-S1 disc herniation with perhaps some contribution from the SI joint. He injected Claimant's SI joint to see if he could isolate the source of Claimant's pain. The outcome of the injection is not contained in the record. He has been diagnosed with bilateral sacroiliitis, questionable RSD, piriformis and gluteus maximus muscle tendonitis, and multifactorial pain. The panel found no SI joint instability. Dr. Kurtz even requested an SI joint arthrogram to either rule in or out an SI instability. Surety would not approve his request. The foregoing is intended to demonstrate that Claimant's condition was not exactly straightforward and, consequently, the treatment he was provided or that was recommended was not without disagreement among the physicians involved.

27. Dr. Kurtz described Colchicine as a powerful anti-inflammatory that the FDA approved for the treatment of acute gout. He testified that any drug that has been FDA approved can be used by a physician for any legitimate purpose, or "off label." He further testified that off label means that a

pharmaceutical company has not spent the money to study the drug in a particular situation for a clinical condition. He has used Colchicine successfully in the past to avoid surgeries and testified it helped relieve Claimant's symptoms. Claimant corroborated his testimony in that regard. Dr. Gary testified he himself would not prescribe Colchicine as it is a "neurotoxin." Dr. Sousa testified as follows regarding Colchicine IV use:

> Q. (By Ms. Christensen): Does the fact that the FDA has apparently approved it for use in gout mean it's approved for other uses?
>
> A. Not necessarily. In fact, it's a drug that I – the first time I had heard of anyone in nearly 29 years now, 29 and a half, almost 30 years – 29 years I guess of practicing medicine, of anyone using colchicine IV for chronic low back pain or inflammatory conditions other than gout.
>
> Now, Dr. Kurtz, I believe, is an older physician than I am, and it may have been when he was training that they were using colchicines IV for its anti-inflammatory effect. But as far as I know, it's not [*sic*] longer used for inflammation which occurs in other circumstance other than gout.

Dr. Sousa Deposition, pp. 14-15.

28. Dr. Sousa's criticism of Colchicine IV treatment focuses on the necessity of the treatment as opposed to the reasonableness of the treatment. Both Dr. Kurtz and Claimant testified that Claimant made some gradual improvement with the treatment. Dr. Kurtz believed the treatments were necessary. While an orthopedic surgeon and a neurosurgeon may not prescribe that treatment, there is no evidence that it is not within a family practitioner's standard of practice to prescribe such treatment, especially in the hinterlands of rural Montana. *See,* Sprague, *infra*. It is significant that Surety did not offer Claimant an alternate form of treatment and paid for a substantial part of the Cochicine IV treatment before inexplicably stopping the payments. It would be an unfair burden on Claimant to bear the costs of treatment Surety had at least initially authorized without having given him some viable treatment options. The Referee finds that the Colchicine IV treatment provided by Dr. Kurtz was reasonable considering the overall medical treatment provided Claimant.

Mileage reimbursement:

29. Idaho Code § 72-432(12) provides that a claimant shall be reimbursed for necessary travel to receive medical care. Because it has been found that the medical care provided by Dr. Kurtz was reasonable, it follows that Claimant is entitled to mileage reimbursement. While Claimant, at times,

traveled approximately 300 miles round-trip to see Dr. Kurtz, Surety offered no alternative. In fact, as late as March 3, 2004, their own panel gave Claimant the option of continuing conservative treatment with Dr. Kurtz. It cannot be determined from the record the amount of the mileage reimbursement. The parties are encouraged to reach an agreement in that regard.

Prescription reimbursement:

30. Claimant seeks reimbursement for certain prescriptions by Dr. Kurtz related to his May 6, 2000, accident and injury. Dr. Kurtz testified that the only prescription contained within Claimant's Exhibit D that was not related to his accident was one for Amaryl. Based on the finding that Dr. Kurtz treatment was reasonable, the Referee finds that Defendants are liable for the remaining unpaid prescriptions contained within Claimant's Exhibit D.

CONCLUSIONS OF LAW

1. Claimant suffered an injury caused by an accident arising out of and in the course of his employment on May 6, 2000.

2. Claimant is entitled to PPI benefits equaling 10% of the whole person with no apportionment for pre-existing conditions.

3. Claimant is not entitled to continuing medical care.

4. Claimant is entitled to PPD benefits equaling 20% of the whole person inclusive of his PPI.

5. Apportionment of PPD benefits pursuant to Idaho Code § 72-406 is not appropriate.

6. Claimant is entitled to be reimbursed for any payments made to Dr. Kurtz and Defendants are liable for any unpaid balance.

7. Claimant is entitled to be reimbursed for mileage to obtain medical treatment.

8. Claimant is entitled to be reimbursed for any payments made for prescriptions prescribed by Dr. Kurtz and Defendants are liable for any unpaid balance with the exception of one prescription for Amaryl.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __17th __ day of ___September___, 2004.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th ___ day of ___October____, 2004, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

EMIL F PIKE JR
PO BOX 302
TWIN FALLS ID 83303-0302

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

___/s/_____

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